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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted] 42

WILLIAM F. BRACK,

Petitioner,

vs.

DORA GROSS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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May 3, 1951.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, William F. Brack, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision in *William F. Brack v. Dora Gross*, No. 6172, decided January 3, 1951.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is set forth at pages 36-9 of the printed record, and is reported in 186 F. 2d (Adv.) at page 940. The opinion of the United States District Court for the District of Maryland is set forth at pages 14-33 of the printed record and is reported in 91 F. Supp. at page 254.

Statement of Matter Involved

This case involves the question of the power of a District Court to exempt from a discharge in bankruptcy a debt which had not been discharged in a prior bankruptcy, when the creditor had unsuccessfully urged other grounds to bar any discharge in the second bankruptcy proceeding.

On February 15, 1937 respondent filed a voluntary petition in bankruptcy in the District Court for the District of Maryland (R. 9, 19).* Petitioner filed therein a claim upon a judgment obtained in the Superior Court of Baltimore City in 1936 (R. 8, 20). The District Court, on March 27, 1937, dismissed the proceeding because of failure to pay the filing fee, without granting a discharge (R. 3, 8, 9, 20).

On March 30, 1946 the respondent filed a second petition in the District Court for the District of Maryland and petitioner again filed a claim on the same judgment (R. 3, 9, 20). He opposed discharge upon grounds other than the failure to obtain a discharge in the prior proceeding, but the District Court granted a discharge October 29, 1947 (R. 3, 10, 20).

On May 11, 1949 petitioner filed in the second bankruptcy cause a petition for a ruling that the said judgment debt be held not affected by the discharge (R. 1, 3-7, 21). The District Court denied the petition, (R. 2, 33) and the petitioner

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* Refers to pages in the Record as printed in this Honorable Court.

appealed to the United States Court of Appeals for the Fourth Circuit (R. 2). The Court of Appeals affirmed on the ground that the granting of discharge in the second proceeding was *res judicata*, although erroneous (R. 36-9), the same ground given by the District Court (R. 19-33). Thus the power of the District Court to act is squarely in issue.

Statement Respecting Jurisdiction

This Honorable Court has jurisdiction to entertain and grant this petition pursuant to Title 28, United States Code, Section 1254.

The judgment of the Court of Appeals was entered January 3, 1951 (R. 40). On March 27, 1951 this Honorable Court extended the time to file this petition to and including May 3, 1951 (R. 41).

Question Presented

Whether a United States District Court can except a debt from a discharge in bankruptcy, a year and a half later, when it discovers that its process has been abused by listing such a debt after a discharge had been previously denied it in an earlier proceeding, or can, in the alternative, the Court construe its prior discharge as not including such debt.

Reasons for Granting Writ

The opinion below of the United States Court of Appeals for the Fourth Circuit is in conflict with the opinion of the United States Court of Appeals for the Second Circuit in the case of *In re Seiden*, 174 F. 2d 586 (1949) and of the First Circuit in the case of *In re Marshall Paper Co.*, 102 Fed. 872 (1900). See Rule 38 (5) (a) of this Honorable Court. The question presented by this petition is an important question relating to bankruptcy procedure, a field of primary interest to the Federal Courts, which should be

resolved by this Honorable Court. The nature of the inter-circuit conflict, and the reasons why it is submitted that the Court of Appeals erred in its decision below, are more particularly set forth in the brief annexed to this petition.

Respectfully submitted,

WILLIAM F. BRACK,
Petitioner.

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May 3, 1951.

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WILLIAM F. BRACK,

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Argument

In this case the respondent filed a voluntary petition in bankruptcy prior to the enactment of the Chandler Act (11 U. S. C. A. §§ 1 *et seq.*, 52 STAT. 840) listing the judgment debt in question. This was dismissed, without a discharge, for non-payment of fees. Such a failure to obtain a discharge is a bar to a later bankruptcy discharge for debts listed in that petition. *Freshman v. Atkins*, 269 U. S. 121 (1925); *Kuntz v. Young*, 131 Fed. 719 (C. A. 8th, 1904);

In re Kuffler, 151 Fed. 12 (C. A. 2d 1907) *cert. denied,* 214 U. S. 520 (1909); *In re Bacon,* 193 Fed. 34 (C. A. 5th, 1912); *In re Loughran,* 218 Fed. 619 (C. A. 3rd, 1914); *Perlman v. 322 West Seventy-Second Street Co.,* 127 F. 2d 716 (C. A. 2d 1942); *Colwell v. Epstein,* 142 F. 2d 138 (C. A. 1st, 1944), *cert. denied,* 323 U. S. 744 (1944). Yet respondent listed the same debt in a second petition nine years later. In the second bankruptcy case the respondent abused the process of the Bankruptcy Court in applying for and obtaining a discharge of the same debt and the Bankruptcy Court should exempt such debt *whenever it becomes aware of the fraud. In re Seiden,* 174 F. 2d 586 (C. A. 2d 1949). *In re Schindler,* 73 F. Supp. 741 (E. D. N. Y. 1947); *In re Finkelstein,* 62 F. Supp. 1015 (E. D. N. Y. 1945); *In re Claff,* 111 Fed. 506 (D. Mass. 1901); *In re Marshall Paper Co.,* 102 Fed. 872 (C. A. 1st, 1900). In the last two cases the courts expressly stated that the coverage of the discharge awaited later action, which is exactly what petitioner sought to do below (R. 17). It should be pointed out that cases involving successive petitions in different District Courts are not in point.

The Court below, however, followed the case of *Ginsburg v. Thomas,* 170 F. 2d 1 (C. A. 10th, 1948) to the effect that the second discharge is *res judicata,* thus making the District Court powerless to act.

In the *Seiden* case the facts were identical to the instant case with respect to the two voluntary petitions *except that the creditor made no appearance in the second proceeding,* as here. Eight years later the creditor moved to have the discharge amended to except the debt in question. The Court of Appeals for the Second Circuit in affirming such an amendment by the District Court said, "As the Freshman case, supra shows, the bankrupt abused the process of the court in applying for and obtaining the discharge

from which this judgment debt was not excepted and the court should, on its own motion, correct the discharge whenever it becomes aware that its own records show that the exception should have been made in the first instance. In re Zeiler, D. C. S. D. N. Y. 18 F. Supp. 539". 174 F. 2d at 587.

The courts below differentiated this situation upon the ground that the petitioner entered an appearance and actively opposed discharge (although on other grounds) and, therefore, is bound by *res judicata*. It is submitted that the *Seiden* case cannot be so differentiated. A creditor is bound by a discharge, until amended, whether or not he enters an appearance. If *res judicata* controls, it would in either case. In the instant case the present issue was not ruled upon before. To say *res judicata* binds all possible issues, which could have been raised, is no answer. In the *Seiden* case, the creditor had the same *opportunity* to object, yet the Court held that there was power to act. The decisions of the Second and First Circuits and Fourth and Tenth Circuits remain in conflict. In two circuits the Courts hold themselves powerless to act, in the other they hold that they can and should act, on their own motion, if necessary, to rectify the fraud practiced on the Court. This conflict should be resolved by this Honorable Court.

In line with the tenor of this Honorable Court's decision in *Freshman v. Atkins, supra*, 269 U. S. at 124, that this District Court in such circumstances "for its own protection should arrest, in limine so flagrant an attempt to circumvent its decree", and with the weight of authority in the Federal Courts, this Honorable Court should reverse the holdings of the courts below that they had no power to protect themselves from the fraud of the respondent because of *res judicata*.

Conclusion

It is respectfully submitted that there is a conflict between the recent decisions of Second Circuit on the one hand and the Fourth and Tenth Circuits on the other, with respect to an important question in the interpretation of a Federal statute, namely the Bankruptcy Act, and Federal practice, namely that of bankruptcy, which should be resolved by this Honorable Court. The writ of certiorari should issue to the United States Court of Appeals for the Fourth Circuit to resolve such conflict in accordance with the weight of authority by reversing the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Jo V. Morgan, Jr.,

Counsel for Petitioner.

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WILLIAM F. BRACK,

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DORA GROSS,

Respondent.

PETITION FOR RECONSIDERATION AND FURTHER BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 42

WILLIAM F. BRACK,

Petitioner,

vs.

DORA GROSS,

Respondent.

PETITION FOR RECONSIDERATION AND FURTHER BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of William F. Brack respectfully asks this Court to reconsider its action in refusing the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision in William F. Brack v. Dora Gross, No. 6172, decided January 3, 1951.

In order to shorten this Petition and Brief for reconsideration of the denial of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, we are content to adopt the excellent brief filed in this Court, on behalf of petitioner, by Jo V. Morgan, Esq., who, due to serious illness, is unable to participate further.

Rule 33, paragraph 2, limits this Petition to "briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (citations), or to other substantial grounds available to petitioner although not previously presented" (citations).

When this Court found itself deluged and swamped with appeals, during the tenure of Chief Justice Taft, one of the methods of relief resorted to was limiting the volume of cases to be considered, and, rules to that effect were promulgated and have since been developed. At present Rule 38 indicates the way the process has developed. One of the essential and fundamental criteria yet remains and probably will continue. It is stated in paragraph 5(b) of said rule:

> "Where a Circuit Court of Appeals had rendered a decision in conflict with other Circuit Court of Appeals on the same matter; * * * or has decided an important question of Federal law which has not been, but should be settled by this Court".

The record discloses that the Federal Circuit Courts of Appeals are divided on the points presented herein and that the Circuit Court of Appeals for the Fourth Circuit, in this case, followed the weaker rulings and disregarded the strongest and latest of all (In re Seiden, 174 Fed. 2nd 586), which is "pat" for this case. There can be no doubt about this, for on page 4 of the Opinion of the United States Court of Appeals for the Fourth Circuit, the Court itself says "on this question the courts are divided" etc.

As to the other feature of Rule 38, the bankruptcy law is a Federal law under which this issue arises and it would seem to be important to settle it since the United States Courts of Appeals are divided on the question.

Adverting to the quotations from Rule 33, supra, there is filed in the record, transcript of the proceedings before Honorable William C. Coleman, Judge in the District Court of the United States for the District of Maryland, October 28, 1947, and, it is believed as to the testimony, argument and facts therein this Court has not been heretofore acquainted. Although a careful reading of this transcript will disclose to any fair, judicial mind, that Judge Coleman was prejudiced, biased, hasty and disposed to listen rather to the oral argument of the attorney for the respondent as to matters entirely *dehors* the record and irrelevant, than to be controlled by what was in the record and before him, nevertheless the transcript does not show the full picture of the court scene. There were certain actions and remarks, some off the record, which the reporter necessarily missed. Off the record, there was discussion of the papers in the first bankruptcy case. The Clerk said they were not available. The Judge irritatedly remarked that they never lost papers in the Court. The petitioner herein left the Courtroom and went out to the Clerk's office, insisted on the papers, got them and another Clerk brought them into the Court and they were then presented to the Court and the transcript will show that the Court had these papers before him at the time he made his decision.

Another phase of the hearing which proves the Judge's bias in the matter was consideration of a large, yellow study sheet, made by an officer of one of the title companies listing 24 real estate transactions in which a housewife, to wit: the said Dora Gross, given only $15.00 a week by her husband, according to the record, participated between the years 1926 and 1942, some before and some after the original petition in bankruptcy and all before the second petition in bankruptcy. The Court had this study in his

hands, made remarks from it, the attorney for the petitioner told the Court what it represented, but the Court brushed it aside as the transcript discloses. The Court paid attention to the oral arguments of the attorney for the respondent and was influenced thereby when said attorney for the respondent contended that there was "only one" transaction in which the respondent engaged. This study sheet disclosed that all twenty-four transactions were without search and guarantee of title by an organized title company, relatives were grantees and a relative was attorney and notary and no revenue stamps were attached on some at least — clearly an inside family job.

The ill feeling of the Court will be noticed from the method in which he tried to trip and corner the attorney for the petitioner on his use of the word "transaction". Also it will be noticed that the attorney for the respondent made an impassioned plea that the husband of the respondent was suffering from attacks of heart trouble, although it was not in record and properly should not have been in the record. The nucleus of this case is that one of two married people against whom a proper judgment was held was selected to go through voluntary bankruptcy for the sole purpose of wiping out that judgment and none other, because of persistent pursuit by the judgment creditor during a number of years. No time was lost by the judgment creditor in any court; when he was turned down in one court, he went to another court and the matter was always in some court. Finally, the United States Federal Court for the District of Maryland, moved by bias, prejudice, and clearly in a mood to sweep the litigation out of court, sophistically reasoned, among other things, that excepting this sole claim substantially in effect amounted to revoking a discharge in bankruptcy, which cannot be done

after a year had passed. Such reasoning produces a metaphysical headache. The claim could have been excepted from the discharge as was sought, and the bankruptcy case maintained in court, because there were court costs, other fees, reports and likelihood of appointing a trustee and any other matters which could have happened in the case. It is obvious that the sole purpose of the voluntary bankruptcy was to dissolve the judgment and restore the respondent as a free trader. Even though only a shell of a case remained, that is only an objective matter and not the fault of this petitioner — but certainly sufficient would remain after the exception of the judgment to refuse, when applied for, a discharge in the second case. This is precisely where the court's reasoning was erratic.

The record further discloses on careful reading that in the twenty-four real estate transactions of Dora Gross, brothers, daughter, a son-in-law and other relatives were parties; a brother-in-law acting as an attorney and notary public on some of the deeds. And in regard to these twenty-four transactions of some considerable amount, no books were kept as required by the bankruptcy law. This was before the Court. That too was brushed aside. Even the transfers six months before the 1936 judgment in this case, were made during the period of *lis pendens*, to her brothers who still hold title. Judge Coleman said (transcript page 35) "we are not interested in prior to 1930 or thereabouts."

The record discloses, after a devious and labyrinthian line of reasoning, contrived, some way or other, to defeat the petitioner, that there is something *res adjudicata* in the case, but, when the vicissitudes encountered before two referees in bankrutpcy, three or four courts, all apparently straining to eradicate petitioner's claim, no conclusion at all can be reached in regard thereto, and a conclusion one way or the other as to *res adjudicata* is merely a good guess.

It is pertinent to call this Court's attention to the fact disclosed by the record that the same Judge William C. Coleman, denied a discharge in the first bankruptcy and should have known and is chargeable with that knowledge, especially when he had the files before him.

It is noteworthy, too, that the respondent has not deigned to enter an appearance before this Court.

Therefore, it is respectfully submitted that the courts below have condoned, acquiesced in, or at least blinked at reprehensible business tactics resorted to all too commonly by a certain class and type of commercials who are not unfortunate but designing and should not be relieved from the burden of debt by the merciful bankruptcy act. (See Noel, History of Bankruptcy Law, Potter Printing Co., 1919). And that there being a conflict between the recent decisions of Second Circuit on the one hand and the Fourth and Tenth Circuits on the other, with respect to an important question in the interpretation of a Federal statute, namely, the Bankrutpcy Act, and Federal practice, namely that of bankruptcy which should be resolved by this Honorable Court, the writ of certiorari should issue to the United States Court of Appeals for the Fourth Circuit to resolve such conflict in accordance with the weight of authority by reversing the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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